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No. 95-86

In The

Supreme Court of the United States

October Term, 1995

DOOLIN SECURITY SAVINGS BANK, F.S.B.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF TO BRIEF FOR THE RESPONDENT IN OPPOSITION AND SUPPLEMENTAL BRIEF

JOHN C. DEAL*
ANTHONY C. WHITE
EMENS, KEGLER, BROWN, HILL & RITTER
A Legal Professional Association
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215-4294
(614) 462-5400

*Counsel of Record

October 19, 1995

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OR CALL COLLECT (402) 342-2831

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ARGUMENT

The Brief for the Respondent in Opposition ("Resp. Br.") deals with only three issues: (1) whether the due process rights of the petitioner, Doolin Security Savings Bank, F.S.B. ("Doolin"), were violated as a result of the financial interest of the respondent, Federal Deposit Insurance Corporation ("FDIC") (Resp. Br. 8-15), (2) whether Doolin had a right to an evidentiary hearing *on the termination of Doolin's deposit insurance* (Resp. Br. 15-16), and (3) whether Doolin had a right to a trial *de novo on the termination of Doolin's deposit insurance* (Resp. Br. 16-19).

Nowhere does the Government dispute Doolin's position that (1) Doolin did not violate a "law or regulation" by withholding the disputed portion of the FDIC's assessment of Doolin; (2) Doolin was entitled to an evidentiary hearing *with respect to its deposit insurance assessment;* and (3) the FDIC's *assessment procedures* violated Doolin's due process rights apart from the financial interest of the decisionmaker.

Although the Government's brief straightforwardly disputes that the FDIC was constitutionally disqualified as a decisionmaker by its financial interest, the Government's arguments on (1) whether Doolin had a right to an evidentiary hearing in connection with the termination of Doolin's deposit insurance, (2) whether Doolin had a right to a trial *de novo,* and (3) whether Doolin had an opportunity to challenge the FDIC's assessment in district court are anything but straightforward.

The Government seeks to avoid certiorari in this case, but it recently has demonstrated a likelihood that it will

seek certiorari in *Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995), which is analogous to this case in that both arise under 12 U.S.C. § 1818 and both involve enforcement actions initiated because a private party failed to pay money as ordered by a federal banking agency.

I. THE GOVERNMENT'S BRIEF ADVANCES ARGUMENTS THAT ARE NEW TO THIS CASE AND ARE AT ODDS NOT ONLY WITH THE FDIC'S ARGUMENTS BELOW, BUT WITH THE DECISION OF THE COURT OF APPEALS.

The Government's Brief advances theories neither argued by the FDIC below nor adopted by the court of appeals. In so doing, the Government now takes positions not only at odds with the positions the FDIC argued in the court of appeals, but at odds with the decision of that court. These changes in position are a further demonstration that the court of appeals erred in upholding the termination of Doolin's deposit insurance.

A. Respondent's Theory That Agency Action Becomes Final *After* The Failure To Seek Judicial Review In District Court Was Neither Argued To The Court Of Appeals Nor Adopted By It And Is Plainly Wrong.

Although the court of appeals held that Doolin had an opportunity to challenge the FDIC's risk-based assessment by an action in district court, App. 18a-19a, it did not characterize either the FDIC staff's assessment or the intra-agency review of the assessment as "final agency

action" within the meaning of 5 U.S.C. § 704.[1] In fact, the court of appeals specifically noted that the FDIC Board had never determined the issue. Pet. App. 5a n.5. Yet without finding that there had been final agency action, the court of appeals held that Doolin "could have sought APA review of the decision of the FDIC Supervisory Committee." Pet. App. 18a. It was its holding that Doolin could have obtained judicial review of an agency action that had not become final that led the court of appeals to conclude that the FDIC procedures satisfied due process.

The Solicitor General takes a different approach from that of the FDIC and the court of appeals. The Government now recognizes that finality is a *prerequisite* to judicial review under the APA. The Government argues that the FDIC staff's adjudication of Doolin's risk category "became final *after* petitioner failed to seek judicial review of the assessment under the APA." Resp. Br. at 10 (emphasis added). This novel position is advanced as a part of an effort to avoid dealing with the APA and due process issues involving the assessment, but instead the theory simply confirms that the assessment was not immediately reviewable in district court under 5 U.S.C. § 704.

In the instant case the FDIC's assessment was an intermediate agency action that became reviewable not

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[1] Section 704 of Title 5, U.S.C. provides, in part: "Agency action made reviewable by statute and final agency action for which there is no other remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

"after petitioner failed to seek judicial review" under 5 U.S.C. § 704, but "on review of the final agency action." *See Board of Governors of the Federal Reserve System v. McCorp Financial, Inc.*, 502 U.S. 32, 43-44 (1991) ("If and when the Board finds that McCorp has violated that regulation, McCorp will have, *in the Court of Appeals*, an unquestioned right to review of both the regulation and its application."(emphasis added)). Under *McCorp*, the FDIC's assessment, like the order in *McCorp* requiring the transfer of assets, would only be reviewable in the context of the review of the agency's final order in the court of appeals. *See also Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*; 59 F.3d 212 (D.C. Cir. 1995); *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); and *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992), which involved judicial review in the courts of appeals under 12 U.S.C. § 1818(h) of orders requiring payment of money to the Resolution Trust Corporation.

B. The Government's Argument That Doolin Violated A Condition Imposed In Writing Demonstrates That Doolin Did Not Violate A Statute Or Regulation.

Until this point the FDIC's position has been that Doolin's withholding of deposit insurance assessments was a "violation" of a statute and a regulation within the meaning of 12 U.S.C. § 1818. Pet. App. 34a. This is the basis on which the court of appeals upheld the FDIC's termination of Doolin's deposit insurance. Pet. App. 26a n.20. The Government's brief now abandons that theory and argues instead that Doolin violated a "condition imposed in writing by the [FDIC] in connection with the approval of

[an] application . . . by the insured depository institution." Resp. Br. at 3. This novel position is not advanced accidentally, but to allow the Government to avoid the APA issues.

First, the "condition in writing" theory is advanced as a part of an argument that what happened before the FDIC constituted something other than an APA "adjudication."[2] By seeking to characterize the FDIC's deposit insurance assessment as a "condition imposed in writing," the Government can argue that FDIC's assessment of Doolin was not an "order" and that neither the FDIC's assessment nor the intra-agency review of the assessment was an "adjudication" within the meaning of the APA. Instead, as George Orwell might have put it, the FDIC was merely "performing a technical task in applying [criteria for risk classification determinations] to [a] particular depository institution." Resp. Br. at 9.

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[2] The APA defines "adjudication" as "agency process for the formulation of an order." 5 U.S.C. § 551(7). The APA defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

Throughout the Solicitor General's brief, the Government studiously avoids using the terminology of the APA. Thus, the assessment becomes a "premium," Resp. Br. 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, the adjudication of Doolin's assessment category becomes an "assessment process," Resp. Br. (I), the "process of assessing the premiums," Resp. Br. 8, "a technical task in applying [the FDIC's regulation] to particular depository institutions," Resp. Br. 9, "determining the proper risk classification," Resp. Br. 9, "setting deposit insurance premiums," Resp. Br. 10, "impos[ing]" "the amount of the deposit insurance," Resp. Br. 10, or "the insurance proceedings," Resp. Br. 12.

Second, the "condition in writing" theory is put forth as a way to overcome the fact that Doolin did not violate a law or regulation.[3] As Doolin demonstrated in its Petition for a Writ of Certiorari, neither 12 U.S.C. § 1818 nor any other statute cited by the Government indicates that the withholding of funds is a "violation" *of a statute or regulation*, which is what Doolin was charged with violating. *See* Pet. 3 n.1 and Pet. App. 34a.

II. CERTIORARI IN THIS CASE IS MORE APPROPRIATE THAN IN *OFFICE OF THRIFT SUPERVISION V. RAPAPORT*

The linchpin of the court of appeals' analysis under the Due Process Clause, which was similar to the Fifth Circuit's analysis of the FDIC's capital directive procedures in *Bank of Coushatta*, 930 F.2d 1122 (5th Cir.), *cert. denied*, 502 U.S. 857 (1991), is that bank examinations do not involve credibility assessments. Pet. App. 16a. Yet the very statute invoked by the FDIC, 12 U.S.C. § 1818, specifically provides for such hearings. *See, e.g., Rapaport v. United States Dept. of the Treasury, Office of Thrift*

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[3] Section 1818(a)(2)(A)(iii) authorizes termination-of-insurance proceedings, *inter alia*, where an insured depository institution has "violated any applicable law, regulation, order, [or] condition imposed in writing in connection with the approval of any application or other request by the insured depository institution." This statutory language is substantially identical with the language of 12 U.S.C. § 1818(b), which was involved in *Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995); *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); and *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992).

Supervision, 59 F.3d 212 (D.C. Cir. 1995); *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); and *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992), all of which dealt with whether private parties could be ordered to pay money to a federal agency under 12 U.S.C. § 1818. All three cases involved plenary hearings with evidence concerning the amount of the money that would be awarded. *E.g.*, *Rapaport*, 59 F.3d at 214 ("Finally, Rapaport claims that the OTS miscalculated Great Life's capital deficiency because it improperly valued certain loans."); *see also First National Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 686 (5th Cir. 1983); Lawrence G. Baxter, *Administrative and Judicial Review of Prompt Corrective Action Decisions by The Federal Banking Regulators*, 7 Admin. L.J. Am. U. 505, 562 (1994): "[I]t is common for examiners to testify in formal enforcement proceedings. They often are subjected to vigorous cross-examination."

On September 28, 1995, the Solicitor General requested additional time within which to file a petition for a writ of certiorari in *Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995). *See* Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *United States Dept. of the Treasury, Office of Thrift Supervision v. Rapaport*, filed Sept. 28, 1995 (No. 95-3-305). In *Rapaport*, the Office of Thrift Supervision ("OTS") sought to require the payment of money for "violation" of an agreement that was the result of a "condition imposed in writing in connection with an application."

In *Rapaport*, the Government will attempt to overturn *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993), in which the

OTS unsuccessfully sought to require the payment of money for "violation" of a "condition imposed in writing in connection with an application." 982 F.2d at 582. Thus, *Rapaport* also deals with the ability of the federal banking agencies, including the FDIC, to use 12 U.S.C. § 1818 to require the payment of money to a government agency. Indeed, the Solicitor General's Application in *Rapaport* indicates that the FDIC is being consulted with respect to the decision whether to seek certiorari in *Rapaport*. *Id.* at 2.

A petition for a writ of certiorari in *Rapaport* will raise issues concerning the federal banking agencies' ability to define the boundaries of their powers under 12 U.S.C. § 1818. Embedded within *Rapaport* is the issue whether the failure to pay money to a government agency can constitute a "violation" within the meaning of 12 U.S.C. § 1813(v), an issue decided against Doolin in the court of appeals. Pet. App. 26a.

A reversal of the court of appeals' decision in *Rapaport* would provide the FDIC with an administrative remedy that it would in all likelihood have used against Doolin if it had thought the power existed. If the Government succeeds in *Rapaport* it would be appropriate to remand the instant case to the FDIC for a reconsideration of its decision in light of this Court's decision in *Rapaport*. Accordingly, it would be appropriate to defer consideration of the petition in this case until the Court considers any petition in *Rapaport*. *See Keney v. New York*, 388 U.S. 440 (1967), where this Court delayed consideration until a decision was reached in a case raising similar issues, and to grant the writ in this case rather than *Rapaport*.

CONCLUSION

For the foregoing reasons, Doolin respectfully urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN C. DEAL*
ANTHONY C. WHITE

EMENS, KEGLER, BROWN, HILL
& RITTER
A Legal Professional Association
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215-4294
Telephone: (614) 462-5400

*Counsel of Record